Supreme Court, U.S.
FILED
MAR 13 2003
CLERK

No. 02-6683

In The

Supreme Court of the United States

HERNAN O'RYAN CASTRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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A. Does the Supreme Court of the United States have jurisdiction to review a United States Court of Appeals decision affirming a dismissal of a 28 U.S.C. § 2255 Petition as successive?

B. When a United States District Court re-characterizes a pro-se federal prisoner's first post-conviction motion as a habeas petition under 28 U.S.C. § 2255, does such re-characterization render the prisoner's subsequent attempt to file a first titled § 2255 petition a "second or successive petition" within the purview of the Antiterrorism and Effective Death Penalty Act (AEDPA)?

II. LIST OF PARTIES TO PROCEEDING IN ELEVENTH CIRCUIT COURT OF APPEALS

A. United States of America

B. Hernan O'Ryan Castro

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C. *Castro v. United States*, 154 L. Ed.2d 911, 123 S. Ct. 993 (U.S. 2003)

VI. STATEMENT OF BASIS FOR JURISDICTION

This Court granted Castro's Petition for Writ of Certiorari on January 27, 2003. 154 L.Ed.2d 911, 123 S.Ct. 993 (U.S. 2003). Specifically, Petitioner seeks review of the Opinion of the Eleventh Circuit in *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002). Jurisdiction to review the Eleventh Circuit's opinion is conferred upon this Court by 28 U.S.C. § 1254.

VII. STATUTES INVOLVED IN CASE

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28 U.S.C. § 2244

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VIII. STATEMENT OF THE CASE

By Order dated January 27, 2003, this Court granted Hernan O'Ryan Castro's (hereinafter referenced to as "Castro") Petition for Writ of Certiorari. 154 L.Ed.2d 911, 123 S. Ct. 993 (U.S. 2003) Specifically, Castro appeals the

May 7, 2002, Opinion of the United States Court of Appeals for the Eleventh Circuit, in the case of *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002). (App. 198.) In its Opinion, the Eleventh Circuit Court of Appeals affirmed the Order of the United States District Court for the Southern District of Georgia dated April 11, 2001 (App. 182), wherein the District Court concurred with the Magistrate Judge's Report and Recommendation (Record 64), and dismissed Castro's Petition filed pursuant to Title 28 U.S.C. § 2255. Mr. Castro is currently incarcerated in Taft, California.

In an indictment returned on September 3, 1991, Castro was charged with conspiracy to distribute and to possess with intent to distribute cocaine (Count 1) and conspiracy to import cocaine (Count 2) in violation of 21 U.S.C. §§ 846 and 963. Castro was convicted on July 14, 1992, and he was sentenced to two hundred and forty months imprisonment. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994). Castro appealed his conviction and sentence, arguing that a variance existed between the evidence offered at trial and the indictment, in that the indictment alleged a single conspiracy while the evidence proved several independent conspiracies. *Taylor*, at 337. Castro also alleged that the evidence was insufficient to support his conviction and that venue was improper. *Taylor*, at 337. Castro further alleged that the trial court erred by allowing certain prejudicial testimony when a witness testified that she had known Castro in prison. *Taylor*, at 338. Finally, Castro appealed the District Court's determination of the quantity of cocaine attributable to him for purposes of sentencing. *Taylor*, at 338. On March 24, 1994, the Eleventh Circuit affirmed Castro's

conviction and sentence. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994).

On July 11, 1994, Castro filed a pro-se Motion for New Trial and Brief in Support Thereof pursuant to Federal Rule of Criminal Procedure 33, based on alleged newly discovered evidence. (App. 7.) In his Rule 33 Motion, Castro raised two issues.

First, Castro alleged that the government had violated the doctrine set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) by not disclosing the government's immunity agreement with its main witness against Castro. (App. 9.) Specifically, government witness Lynn Lowe testified against Castro at his trial. (App. 11.) She had previously entered into an immunity agreement with the government in exchange for agreeing to cooperate and assist in certain government drug investigations. (App. 12.) According to Castro, he was not made aware of this information until it was revealed during a separate trial of one of Castro's co-conspirators, after Castro had already been convicted. (App. 12.)

Next, Castro alleged in his Rule 33 Motion for New Trial that the government knowingly introduced perjured testimony by two of its witnesses. (App. 9.) Specifically, Castro alleged that Government witness Lynn Lowe testified under cross-examination at his trial that she had no involvement with drugs in the past. (App. 23.) Castro alleged that the government knew this was false testimony based on the immunity agreement Castro later learned of. (App. 23.) Castro alleged that Lowe had entered into an immunity agreement in exchange for assisting government officials in investigating drug crimes, because Lowe herself had been caught participating in drug related offenses. (App. 25.) Again, Castro alleged that he was not

made aware of the immunity agreement until after his trial, and the government had not been forthcoming with disclosure prior to Castro's trial. (App. 12.) Castro alleged that the government's failure to disclose the immunity agreement violated the doctrines set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 504 U.S. 150 (1972). (App. 9.)

In response to Castro's pro-se Rule 33 Motion for New Trial, the government stated in its brief to the District Court that it had no objection to treating Castro's Rule 33 Motion as a demand for relief under both Rule 33 and 28 U.S.C. § 2255. (App. 110.) Specifically, the government stated "Castro's allegation of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255, but inasmuch as such a motion may be filed at anytime, the government has no objection to Castro's Motion for New Trial being considered as demanding relief under both Rule 33 and 28 U.S.C. § 2255." (App. 110.) After receiving the government's response to his Rule 33 Motion, Castro filed a pro-se reply to the government's brief. In his response, Castro argued that he had properly filed his Motion for New Trial pursuant to Rule 33. (App. 116.) Castro stated that the government's argument that the "allegations of a *Brady/Giglio* violation are more properly cognizable under a motion pursuant to 28 U.S.C. § 2255" was incorrect. (App. 116.)

The United States District Court for the Southern District of Georgia denied Castro's Rule 33 Motion in an Order entered October 28, 1994. (App. 137.) However, the Order did more than simply deny the Rule 33 Motion. The Order stated: "in the government's response, the government asserts that it has no objection to defendant's Motion for New Trial being treated as demanding relief under

both Rule 33 and 28 U.S.C. § 2255. Accordingly, the Court will consider defendant's motion as requesting both kinds of relief." (App. 139, 140.) Therefore, in denying Castro's Rule 33 Motion, the District Court considered Castro's Motion as requesting relief under both Rule 33 and 28 U.S.C. § 2255.

Castro appealed the denial of his self-titled Rule 33 Motion to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the District Court's denial of Castro's motion. In its Opinion, the Court of Appeals stated that the appeal arose "from the denial of relief in regard to a combined Motion to Vacate, Set Aside or Correct Sentence, 28 U.S.C. § 2255 and Motion for New Trial, Federal Rule of Criminal Procedure 33." (App. 147.)

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended 28 U.S.C. § 2255 by barring Federal habeas petitioners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances. On April 22, 1997, Castro, acting pro-se, filed his first titled 28 U.S.C. § 2255 petition. (App. 148.) On the "form motion" which Castro was required to complete, he was asked if he had "previously filed any petitions, applications, or motions with respect to this judgment in federal court?" Castro responded by stating that he had previously filed a motion pursuant to the Federal Rule of Criminal Procedure Rule 33. (App. 151.) Castro's first titled 28 U.S.C. § 2255 petition, alleged, among other things, that he was rendered ineffective assistance of counsel in violation of the Sixth Amendment for various errors made by his trial counsel. (App. 154.)

The Government responded to Castro's § 2255 petition and argued that the petition was successive and should be

dismissed as a second § 2255 petition. (Record 20.) Castro filed a "Traverse to the Government's Response to his § 2255 Motion." (Record 21.) In his response, Castro argued once again that his Titled § 2255 Petition was his first habeas filing. (Record 21.) On April 13, 1998, the District Court adopted the Report and Recommendation of the Magistrate Judge and denied Castro's § 2255 Petition. (Record 29.) There was no mention by the District Court regarding Castro's § 2255 Petition being successive.

The Eleventh Circuit Court of Appeals granted Castro's Motion for Certificate of Appealability on the issue of whether counsel was ineffective by not adequately arguing to suppress Castro's post-arrest statements. In its Order of June 13, 2000, the Eleventh Circuit Court of Appeals found that the district court had not applied Sixth Amendment analysis in deciding whether or not Castro's trial counsel was ineffective in failing to move to suppress statements Castro made after his arrest. (App. 172.) Therefore, the Eleventh Circuit vacated the decision of the district court and remanded with instructions to the district court to employ Sixth Amendment analysis, develop more fully the facts surrounding Castro's claim, and examine the record to determine if the petition is successive. (App. 172.) Also, the Eleventh Circuit suggested that the district court hold an evidentiary hearing with regard to the post-arrest statements and suggested that the appointment of counsel for Castro would assist the court. (App. 172.)

On September 13, 2000, before the evidentiary hearing was held, the Government filed a Motion to Dismiss Castro's petition as successive pursuant to 28 U.S.C. § 2255. (Record 44.) The Government acknowledged in its Motion to Dismiss that on July 14, 1994, Castro had filed a

Motion for New Trial based on newly discovered evidence. (Record 44.) However, the Government argued that because the district court grounded its holding also under § 2255, and because the Eleventh Circuit termed Castro's pleading as a combined 28 U.S.C. § 2255 Petition and Rule 33 Motion for New Trial, Castro's first self-titled § 2255 Petition was successive, and should be dismissed pursuant to AEDPA. (Record 44.)

An evidentiary hearing was held on September 29, 2000, in the United States Magistrate Court. The proceedings of the Magistrate hearing are not part of this appeal, as on January 30, 2001, the Magistrate Court Judge issued a Report and Recommendation granting the Government's Motion to Dismiss Castro's 28 U.S.C. § 2255 Petition as successive. (App. 175.) The substance of Castro's Petition and the issues raised at the evidentiary hearing were not ruled upon. Thereafter, on April 11, 2001, the District Court adopted the Report and Recommendation of the Magistrate Court and dismissed Castro's Petition. (App. 182.) On April 25, 2001, the District Court granted a Certificate of Appealability with respect to the issue of whether the 28 U.S.C. § 2255 petition filed by Castro is a successive petition. (App. 186.)

After receiving briefs from Castro and from the United States, the United States Court of Appeals for the Eleventh Circuit entered an Opinion on January 2, 2002, in favor of Castro. (App. 188.) In its Opinion of January 2, 2002, the Eleventh Circuit held "a district court's re-characterization of a Petitioner's initial post-conviction motion will not be considered a first habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such re-characterization." (App. 197.)

The Eleventh Circuit found in its January 2, 2002, Opinion that "Castro's original Rule 33 Motion for New Trial asserted a cognizable ground for relief and that it was based upon alleged new evidence which Rule 33 explicitly provides as a basis for bringing such a motion." (App. 196.) The Court held that it was inconceivable that Castro or any other pro-se litigant could have foreseen the ultimate consequences of the district court's re-characterization of his Rule 33 Motion. (App. 196.) The Eleventh Circuit recognized the unfairness inherent in re-characterizing the Rule 33 Motion and held that the re-characterization would not count as a first habeas petition. (App. 197.) Therefore, the Court found that Castro's current § 2255 Petition is not successive and remanded the case to the District Court to consider the merits of the petition. (App. 197.)

Thereafter, mandate never issued as required by Rule 41 of the Federal Rules of Appellate Procedure and on May 7, 2002, surprisingly, the Eleventh Circuit vacated its Opinion of January 2, 2002, and substituted a completely opposite Opinion. (App. 198.) No Petition for Rehearing was ever filed by the government. Specifically, the Eleventh Circuit held in its Opinion dated May 7, 2002, that Castro's § 2255 Petition is successive. In support of its one hundred and eighty degree change in opinion, the Eleventh Circuit held that to allow Castro to file his current § 2255 petition "might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions." Therefore, the Eleventh Circuit disagreed with the First Circuit's Opinion in *Raineri v. United States*, 233 F.3d 96, 99 (1st Cir. 2000). Instead, the court stated that "in future cases where the motioner is not filing a second motion, but rather is asking to withdraw his motion or include additional

claims after a district court has decided to re-characterize the initial motion as a § 2255 motion, we would agree with a clear majority of the circuits that the district courts should warn prisoners of the consequences of re-characterization and provide them with the opportunity to amend or dismiss their filings." (App. 205.) The same panel which entered the January 2, 2002, Opinion entered the May 7, 2002, Opinion. The Honorable Judge Roney dissented to the May 7, 2002, Opinion.

On May 24, 2002, Castro filed a Petition for Rehearing En Banc with the Eleventh Circuit. On July 5, 2002, the Eleventh Circuit issued an Order denying Castro's Petition for Rehearing. On July 15, 2002, the Eleventh Circuit entered a judgment and issued mandate. Finally, on July 25, 2002, the District Court ordered that the Judgment of the Eleventh Circuit be made the Judgment of the District Court and Castro's first self-titled habeas petition was dismissed and never ruled upon. (Record 81.)

IX. SUMMARY OF THE ARGUMENT

A. Jurisdiction in this Court is proper

This Court has jurisdiction to review the Eleventh Circuit's decision affirming the dismissal of Castro's § 2255 Petition as successive. AEDPA, enacted in 1996, amended 28 U.S.C. § 2255. The amendment basically prevents federal prisoners such as Castro from filing more than one habeas petition. Furthermore, if a petitioner files a second or "successive" petition, that petition must be certified by the Court of Appeals before it may be heard pursuant to 28 U.S.C. § 2244. A decision of the Court of Appeals not to certify a second petition may not be appealed to the

Supreme Court. 28 U.S.C. § 2244(3)(e). However, the appeal in this case is not from a decision by the Court of Appeals not to certify a second petition. Rather, the appeal in this case is from a Court of Appeals decision labeling a first titled § 2255 petition as successive and thus *requiring* certification by the Court of Appeals before it may be ruled upon. This appeal is from an Order dismissing a habeas petition as successive and such appeal is proper pursuant to 28 U.S.C. § 2255 which allows an appeal to the Court of Appeals from the Order and 28 U.S.C. § 1254 which allows this Court to review the decision of the Court of Appeals.

B. Re-characterization of post-conviction motions does not render subsequent § 2255 petitions "successive"

First, Courts sometimes "re-characterize" pro-se motions when there is no reason to. Castro's first self-titled 28 U.S.C. § 2255 petition is not "successive" and should be ruled upon. Castro's first Rule 33 Post-conviction Motion was filed on July 11, 1994. (App. 7.) The Motion was based on newly discovered evidence. Specifically, Castro found out, after he was convicted, that one of the government's witnesses who testified against him at trial had entered into an immunity agreement with the Government in exchange for cooperation with the Government's drug investigation. (App. 11.) This information was not provided to Castro's counsel prior to his trial. Castro filed his Motion under Federal Rule of Criminal Procedure 33. Even though Castro was acting pro-se, his Rule 33 Motion was properly pled and labeled as a Rule 33 Motion for New Trial. Subsequently, at the Government's urging, the District Court and Court of Appeals "re-labeled" Castro's Motion as one pursuant to 28 U.S.C.

§ 2255 *prior* to the enactment of the AEDPA. After the enactment of AEDPA, Castro filed his first titled § 2255 petition on Sixth Amendment grounds. The Government now attempts to use the gate keeping requirements of AEDPA to prevent Castro's first § 2255 habeas petition. In essence, the Court wrongfully re-characterized Castro's Rule 33 Motion as one made pursuant to § 2255 and the Government now wishes to preclude a second post-conviction motion. However, nowhere does the law preclude the filing of a Rule 33 Motion for New Trial and a later § 2255 petition when both are procedurally proper.

Secondly, if re-characterization of Castro's pro-se Rule 33 Motion was proper, fairness concerns preclude denial of Castro's first titled § 2255 petition as successive. If pro-se petitioners are not given notice prior to having initial post-conviction motions re-characterized by district courts, then they have no way of knowing that they will never be able to file a § 2255 petition in the future. It is unfair for the district court, especially at the urgence of the government, to re-characterize these motions as § 2255 petitions, fully understanding the ramifications of the re-characterization without explaining such to the pro-se petitioner. Every Circuit Court of Appeals save the Eleventh and Fifth Circuits has noted the unfairness inherent in this practice.

X. ARGUMENT

1. Jurisdiction in this Court is Proper

In addition to the question presented in Castro's Petition for Writ of Certiorari, this Court directed the parties to brief and argue the question as to whether this Court has "jurisdiction to review the Eleventh Circuit's

decision affirming the dismissal of a § 2255 petition for Writ of Habeas Corpus as second or successive." 154 L.Ed. 2d 911, 123 S. Ct. 993 (U.S. 2003). Castro acknowledges that 28 U.S.C. § 2244(3)(e) limits certain appeals to this Court after a denial of a habeas petition. However, Castro's appeal is not one which is barred by the statute.

Castro's Motion for New Trial was filed on July 11, 1994. (App. 7.) It was not until after the enactment of AEDPA in 1996 that Castro filed his first titled 28 U.S.C. § 2255 Petition for Writ of Habeas Corpus. (App. 148.) Castro's 28 U.S.C. § 2255 Petition was filed on April 22, 1997. (App. 148.) AEDPA amended § 2255 by generally limiting a federal prisoner to one § 2255 petition. A "second or successive" petition may be filed only with the approval of the court of appeals. Specifically, Paragraph 8 of 28 U.S.C. § 2255 states:

> "A second or successive motion must be certified as provided in § 2244 by a panel of the appropriate Court of Appeals to contain (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to the case on collateral review by the Supreme Court, that was previously unavailable."

28 U.S.C § 2244(3)(e) states that a decision by the Court of Appeals not to certify a second petition may not be appealed to the Supreme Court. However, Castro's appeal is not from a decision declining to certify a second petition. Castro is not asking this Court to review the denial of a certification by the Eleventh Circuit Court of Appeals.

Castro is appealing the Eleventh Circuit's decision which *required* certification by concluding that Castro's § 2255 petition was successive. Castro's first self-titled § 2255 petition was dismissed and never ruled upon. The statute (§ 2244(3)(e)), prevents appeals of successive petitions to this Court. Castro is asking this Court to determine whether the requirements of the statute regarding certification apply to his case because as Castro has argued, his petition is not successive.

The language of 28 U.S.C. § 2255 itself allows for Castro's appeal. 28 U.S.C. § 2255 addresses appeals from denials of habeas petitions and states "an appeal may be taken to the Court of Appeals from the order entered on the motion as from the final judgment on application for a Writ of Habeas Corpus."

In this case, Castro filed a § 2255 petition, and the district court entered an Order dismissing it as successive without ruling on the merits, and Castro appealed to the Court of Appeals. The Court of Appeals affirmed, and now Castro appeals to this Court pursuant to 28 U.S.C. § 1254. Neither AEDPA, nor the habeas statutes (§§ 2254, 2255) restrict an appeal of the denial of a § 2255 petition to this Court. The reason Castro's petition was dismissed is because the Eleventh Circuit feels it is "successive." (App. 206.) However, the reason for dismissal has nothing to do with appealability to this Court.

A. When a district court re-characterizes a pro-se federal prisoner's first post-conviction motion as a petition under 28 U.S.C. § 2255, such re-characterization should not render the prisoner's subsequent attempt to file a first titled § 2255 petition as successive for two reasons.

1. *District courts don't always get it right when they attempt to re-characterize*. For instance, the district court in Castro's case did not get it right when Castro's Rule 33 Motion for New Trial was re-characterized. Castro's first post-conviction motion filed on July 11, 1994, was procedurally proper and should never have been "re-characterized" as a § 2255 petition by the district court at the urgence of the Government. When Castro filed his pro-se Rule 33 Motion for New Trial, AEDPA had not yet been enacted. Therefore, the harm done by re-characterization of the Motion by the court as a § 2255 petition could not have been anticipated by the district court.

It is not uncommon for courts to "re-characterize" or "retitle" pro-se motions as § 2255 petitions:

> "Federal Courts have long recognized that they have an obligation to look behind the label of a motion filed by a pro-se inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan*, 915 F.2d 622, 624-25 (11th Cir. 1990).

This accommodation is the result of the time honored practice of liberally construing pleadings of pro-se plaintiffs. *Haynes v. Kerner*, 404 U.S. 519, 520 (1972). In accordance with this practice, "district courts routinely convert post-conviction motions of prisoners who unsuccessfully

seek relief under some other provision of law into motions made under . . . § 2255 and proceed to determine whether the prisoner was entitled to relief under that statute." *Adams v. United States*, 155 F.3d 582, 583 (2nd Cir. 1998). These conversions were justified because they were harmless and they also assisted prisoner movants in dealing with legal technicalities that might otherwise preclude prompt adjudication of their claims. *Id.* "Several Courts of Appeals have endorsed this approach as fair and efficient." *United States v. Miller*, 197 F.3d 644, 648 (3rd Cir. 1999). Therefore, both before and after the enactment of the AEDPA in 1996, it has been common practice for district courts to re-characterize motions as § 2255 petitions when the post-conviction motion is procedurally improper as pled. This may explain why the district court in Castro's case was so quick to re-characterize Castro's Rule 33 Motion for New Trial. The ramifications of re-characterization were obviously not as great prior to the enactment of AEDPA. It stands to reason that the district court in Castro's case never intended to harm Castro by re-characterizing his Rule 33 Motion for New Trial. The intent in re-characterizing motions for pro-se prisoners presumably is to *assist* the prisoner in having a claim heard which may have been filed under the wrong title. However, Castro has obviously been harmed by this practice.

The Government argues that because Castro's Rule 33 Motion was re-characterized and labeled as a § 2255 petition, his current § 2255 Petition is "successive" and should be dismissed for failure to obtain certification required by 28 U.S.C. § 2255. (Record 44.) However, rather than looking at how the court, at the Government's urging, "labeled" Castro's 1994 pleading, the substance of

the pleading must be examined to determine if the pleading was procedurally proper as a Rule 33 Motion for New Trial. If so, the current § 2255 petition is the first and the dismissal of it as successive is improper.

The United States Court of Appeals for the Second Circuit certainly recognizes this dilemma.

> "If a District Court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as a "second" 2255. Thus, a conversion, initially justified because it harmlessly assisted the prisoner/movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity to have a well justified grievance adjudicated. The Court's act of conversion which we approved under pre-AEDPA law because it was useful and harmless might, under AEDPA's new law, become extraordinarily harmful to a prisoner's rights. A prisoner convicted pursuant to unconstitutional proceedings might lose the right to have a single petition for habeas corpus adjudicated, solely by reason of a district court having incorrectly re-characterized some prior motion as one brought under § 2255. **We do not suggest it would be appropriate for a later court to deem the earlier motion as one filed under § 2255 solely because the earlier court so labeled it. We ruled in *Chambers v. United States*, 106 F.3d 472, 474-475 (2nd Cir. 1997) that whether a motion was made under § 2255 should be determined by reference to the relief sought in the motion rather than what label the movant used. We think this would be so for labels applied by the Court as well, at least where an application that is not a § 2255 motion is erroneously deemed to be one.**" *Adams v. United States*, 155 F.3d 582, 583-584 (2nd Cir. 1998) *emphasis added.*

Therefore, re-characterization by a district court of a post-conviction motion as a § 2255 petition should not preclude a first titled § 2255 petition because sometimes a district court's re-characterizations are simply wrong. Castro's Rule 33 Motion for New Trial was erroneously deemed to be a § 2255 petition. Again, no law suggests that it is improper for a petitioner to file a Rule 33 Motion for New Trial and a § 2255 petition in the same case. Interestingly enough, throughout the procedural history of this appeal, the Government has never cited any law as to why Castro's initial Rule 33 Motion for New Trial was improperly pled. It simply wasn't.

Again, in his Rule 33 Motion for New Trial, Castro argued that he had discovered new evidence to suggest that the Government had violated the *Brady* doctrine by not disclosing the Government's agreement with one of its main witnesses against Castro. (App. 9.) Castro also argued that the Government knowingly introduced perjured testimony when it allowed the same witness to testify that she had no involvement with drugs in the past. (App. 9.) Castro alleged that the Government knew this was false testimony at Castro's trial based on the immunity agreement of which Castro later learned. (App. 9.) Castro was not made aware of the immunity agreement until after his trial because the Government had not disclosed it prior to Castro's trial. (App. 12.)

Castro's Rule 33 Motion for New Trial was proper and should have never been re-characterized. Federal Rule of Criminal Procedure Rule 33 states that it is a proper tool

to use for filing motions based on newly discovered evidence. Castro's Motion was based on newly discovered evidence and it should have never been re-characterized because it was procedurally proper. This Court has considered Rule 33 Motions for New Trial based on *Brady* violations before. Specifically, in *Giglio v. United States*, 405 U.S. 150, 151 (1972) the defendant filed a Motion for New Trial following his conviction. The Defendant had discovered that the prosecution had secretly promised a witness that he would not be prosecuted if he testified. This Court considered the Defendant's Motion for New Trial and determined that due process concerns required a new trial and reversed the judgment of conviction. *Giglio*, at 155.

Again, in *United States v. Agurs*, 427 U.S. 97, 100 (1976), the Defendant filed a Rule 33 Motion for New Trial in the Court of Appeals based on newly discovered evidence of an alleged *Brady* violation. This Court decided the Defendant's *Brady* claims on the merits pursuant to the Motion for New Trial. *Id*.

In *United States v. Josleyn*, 206 F.3d 144, 151-52 (1st Cir. 2000), the First Circuit considered the defendant's Motion for New Trial. *Josleyn*, at 148. The Motion for New Trial alleged *Brady* violations and the merits of the allegations were considered.

The Sixth Circuit in *United States v. Frost*, 125 F.3d 346, 382 (6th Cir. 1997) held that an alleged *Brady* violation could be properly heard in a Rule 33 Motion for New Trial. In *United States v. Espinoza-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990), the court stated that the defendant's Motion for New Trial under Federal Rule of Criminal Procedure 33 should be granted due to the Government's failure to disclose evidence that could have

been used to impeach a Government witness. Also, in *United States v. Runyan*, 290 F.3d 223 (5th Cir. 2002), the court cited well established law holding that when a Rule 33 Motion for New Trial based on newly discovered evidence raises a *Brady* violation, an appellate court should apply the three prong Brady test to determine whether a new trial is appropriate. *Runyan*, at 245.

This Court and the Circuit Courts of Appeals have long recognized that it is proper for Defendants to file Motions for New Trial based on newly discovered evidence in order to raise alleged *Brady* violations. In fact, the Eleventh Circuit recognized this fact in its first *Castro* decision filed January 2, 2002. (App. 188.) Specifically, the Eleventh Circuit stated " . . . Castro's Rule 33 motion for a new trial asserted a cognizable ground for relief. The motion was based upon alleged new evidence, which Rule 33 explicitly provides as a basis for bringing such a motion." (App. 196.) There was nothing wrong with Castro's initial Rule 33 Motion for New Trial and it was improperly re-characterized. The district court's actions in Castro's case illustrates that courts don't always get it right when attempting to re-characterize first post-conviction motions. Sometimes, there is no need for re-characterization, but it is done anyway. This creates obvious problems under AEDPA. Courts should not be given free reign to re-characterize post-conviction motions and then use AEDPA to prevent habeas petitions. Castro does not argue that there is anything wrong with re-characterizing pro-se post-conviction motions in an attempt to help pro-se petitioners. However, as has been shown in Castro's case, re-characterization is not always necessary when done and

when a post-conviction motion is proper as pled, to unilaterally re-characterize it and prevent a later habeas petition is inherently unfair.

B. Even when it is procedurally proper for district courts to re-characterize post-conviction motions as § 2255 petitions, fairness concerns require notice to the pro-se petitioner of the ramifications of such re-characterization.

Again, as Castro argued in his Petition for Writ of Certiorari, every circuit court of appeals has considered this issue. Every circuit other than the Eleventh and Fifth Circuits have decided that unless a pro-se petitioner is provided with notice of the consequences of re-characterization, a first post-conviction motion which is re-characterized by the court will not count as a "first" habeas petition for purposes of the AEDPA. Each of the seminal cases in each circuit was discussed in Castro's Petition for Writ of Certiorari. Further research of the cited cases indicates that since Castro's petition was filed, the positions of the circuits have not changed on this issue. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits recognize the fact that it is unfair for a court to re-characterize a post-conviction motion, without the approval of the author, and to later deny a first titled habeas petition as "successive." The Fifth and Eleventh Circuits do not recognize this fact. The only disagreement among the majority circuits is in which mechanism to apply to ensure that petitioners' first titled habeas petitions are heard and ruled upon.

As the D.C. Circuit stated,

> "District Courts should not re-characterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such re-characterization, agrees to have the motion so re-characterized, or (b) the Court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than to have it so re-characterized. *Adams v. United States*, 155 F.3d 582, 584 (2nd Cir. 1998), see also *U.S. v. Emanuel*, 288 F.3d 644, 649 (4th Cir. 2002) (adopting informed consent/notice approach similar to *Adams*); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2001) (same); *U.S. v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000) (same); *U.S. v. Miller*, 197 F.3d 644, 652 (3rd Cir. 1998) (adopting expanded notice approach)." *U.S. v. Palmer*, 296 F.3d 1135, 1145 (D.C. Cir. 2002).

The First and Seventh Circuits do not require the protocol mentioned, but rather simply refuse to count a re-characterized motion as a "first" habeas motion sufficient to trigger AEDPA's gate keeping requirements if a district court converts a post-conviction motion into a § 2255 petition without notice and an opportunity to be heard. *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000), *Henderson v. United States*, 264 F.3d 709, 711 (7th Cir. 2001). Either way, the majority of the circuits realize that the purpose of the AEDPA may be maintained while at the same time being fair to pro-se litigants.

There are many reasons why the decisions in *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002) and *In Re: Toliver v. United States*, 97 F.3d 89 (5th Cir. 1996) are unfair and why re-characterized motions should not count as "first" motions under AEDPA.

First, if the true reason for re-characterizing initial post-conviction motions in the first place is to benefit the pro-se petitioner, then the *Castro* and *Toliver* decisions make no sense.

> "Before the AEDPA, District Courts received various and sundry post-conviction motions from prisoners, examined their substance and the relief sought, and, when appropriate, routinely treated certain of them as having been made pursuant to § 2255, regardless of the label the prisoner gave the motion or the fact that no label was given at all. A number of circuits, ours included, approved this practice because at the time it benefitted the prisoner. See, *e.g.*, *Raines v. U.S.*, 423 F.2d 526, 528 (4th Cir. 1970). . . ." *United States v. Emanuel*, 288 F.3d 644, 647 (4th Cir. 2002).

Because these motions have historically been re-characterized in order to benefit pro-se prisoners so that legitimate claims might be heard even if improperly pled, it seems unconscionable that the same court which re-characterizes the motion would later use the AEDPA to prevent the filing of potentially valid claims. If the district court in Castro's case had never re-characterized his Rule 33 Motion for New Trial as a § 2255 petition, his current § 2255 petition would clearly be ruled upon. Therefore, if the true reason for re-characterizing Castro's Rule 33 Motion was to assist him, the rationale in the Eleventh Circuit's decision deeming Castro's § 2255 Petition successive is not

consistent with the district court's original intent. If the district court's intent behind re-characterization was to hurt Castro (or the pro-se petitioner) AEDPA should not prevent a first titled habeas petition for obvious reasons.

Next, re-characterized motions should not count as "first" petitions under AEDPA because AEDPA does not define what constitutes a "successive" or "second" motion. For example, Castro's Rule 33 Motion was obviously re-characterized. However, if a different petitioner in the Eleventh Circuit were to file the same Rule 33 Motion raising the exact same issues, the district court would not have to re-characterize it and it may not be re-characterized, and therefore, a first self-titled § 2255 petition filed later would not be deemed "successive." Because there is no rule requiring re-characterization of a Rule 33 Motion for New Trial as a § 2255 petition, the decision to re-characterize precludes Castro's Petition, but the other theoretical petitioner would be allowed to have his or her § 2255 petition ruled upon. In essence, the Eleventh Circuit will not allow the district court to consider Castro's first titled § 2255 petition, but it would allow the district court to consider the theoretical petitioner's § 2255 petition simply because the district court chose not to re-characterize the theoretical petitioner's first post-conviction motion, for whatever reason.

Nowhere does the AEDPA define what constitutes a § 2255 petition. The AEDPA simply states that a petitioner cannot file more than one § 2255 petition without certification from the Court of Appeals. The district courts of the Eleventh and Fifth Circuits should not be able to unilaterally declare any post-conviction motion to be a § 2255 petition without giving notice to the petitioner or the opportunity to withdraw the motion. Allowing the Eleventh and Fifth

Circuits to do so goes beyond the purpose of AEDPA. The purpose of AEDPA is to prevent successive habeas petitions, not to prevent more than one post-conviction motion of any type.

Finally, re-characterized post-conviction motions should not count as "first" petitions under AEDPA because it is simply unfair to pro-se petitioners. In *Haynes v. Kerner*, 404 U.S. 519, 520 (1972) this Court held that pro-se pleadings are held to less stringent standards than those drafted by attorneys. Therefore, this Court has recognized the fact that pro-se parties cannot be expected to understand the nuances of laws such as AEDPA. The Eleventh Circuit's opinion on this issue is at odds with every other Circuit except the Fifth. The majority circuits address the fairness concerns, as did Castro in his Petition for Writ of Certiorari to this Court. The basic premise of those majority circuits on this issue is that it is unfair for a district court to re-characterize a pro-se petitioner's post-conviction motion as a § 2255 petition without giving the petitioner notice of the potential adverse consequences of such re-characterization or an opportunity to withdraw the petition. *Adams v. United States*, 155 F.3d 582, 583 (2nd Cir. 1998). This is especially true for petitioners such as Castro, who filed their first post-conviction motions *before* enactment of AEDPA. There was no way possible for Castro to have known of the ramifications of the re-characterization of his Rule 33 Motion for New Trial. Other arguments in support of pro-se petitioners in this regard are discussed in the recently published and well written comment *One Bite at the Apple: The Effect of Re-characterization on Post-Conviction Relief Under 28 U.S.C. § 2255"* 75 Temple L. Rev. 613 (2002).

Again, the majority circuits seem split on how to implement the fairness concerns inherent in re-characterization. Castro proposes that the procedure implemented by the Third Circuit in *United States v. Miller*, 197 F.3d, 644, 652 (3rd Cir. 1999) be adopted by this Court. In *Miller*, the Court held that before re-characterizing post-conviction motions, the district courts should inform the inmate that he may choose to: (1) have his motion ruled upon as filed; (2) have his motion re-characterized as a § 2255 motion and heard as such but lose his ability to file successive petitions absent certification by the Court of Appeals or (3) withdraw the motion and file one all inclusive § 2255 Petition within the one year statutory period. *Miller*, at 652. Other Circuits address concerns that such notice requirements will burden the district courts with protocol requirements. *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000). However, it would seem that the only new burden imposed upon a district court would be to simply send a form notice to an inmate prior to re-characterizing the inmate's post-conviction motion. The small burden placed on the district courts seems minuscule in comparison to the possibility that petitioners may be deprived of their right to have their habeas petitions ruled upon.

CONCLUSION

When Hernan O'Ryan Castro filed his pro-se Rule 33 Motion for New Trial in 1994 based on newly discovered evidence, he had no idea that such a filing would later preclude the filing of a habeas petition pursuant to 28 U.S.C. § 2255. Many federal prisoners convicted in the Fifth and Eleventh Circuits may be in similar situations.

As has been argued, it is entirely possible for a federal prisoner in the Fifth or Eleventh Circuits to be prevented from ever filing a § 2255 petition due to improper re-characterization of post-conviction motions.

Re-characterization of pro-se post-conviction motions by district courts has always been a noble act. It is right for district courts to hear legitimate claims which may be precluded simply because they are "titled" or "pled" improperly by unknowing prisoners. District courts should continue this practice as it benefits no one to dismiss legitimate claims simply because the claim may be pled improperly.

However, with the enactment of AEDPA, district courts should simply be more careful when re-characterizing post-conviction motions. Castro asks that he and other prisoners be given notice and an opportunity to withdraw or amend those motions which district courts feel compelled to re-characterize. When such notice is not given and motions are re-characterized, prisoners may lose legitimate claims due to the gate keeping requirements of AEDPA. It is not far fetched to suggest that there may be prisoners in the Fifth or Eleventh Circuits either now or in the future who are in custody as the result of a violation of their constitutional rights and who cannot attack such violations because of the decisions in *Toliver* and *Castro*. The purpose of AEDPA was to prevent successive habeas petitions, not to prevent habeas petitions all together.

Castro requests that this Honorable Court reverse the opinion of the Eleventh Circuit and implement the policy adopted by the Third Circuit in *United States v. Miller*, 197 F.3d 644, 652 (3rd Cir. 1999). Specifically, Castro asks that this Court issue a holding requiring that before

re-characterizing post-conviction motions, district courts must inform the inmate that he may choose to: (1) have his or her motion ruled upon as filed; (2) have his or her motion re-characterized as a § 2255 petition and heard as such, but lose his or her ability to file successive petitions absent certification by the Court of Appeals, or (3) withdraw the motion and file one all inclusive § 2255 petition within the one year statutory period.

Respectfully submitted,

This 13 day of March, 2003

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